RECEIVED
JUN 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81 6908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELWOOD BARCLAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Elwood Barclay, in proper person
437 East Monroe Street
Jacksonville, Florida 32202

Please serve:

Elwood Barclay, in proper person
437 East Monroe Street
Jacksonville, Florida 32202

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2 - 3
MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW	3
REASONS FOR GRANTING THE WRIT	
I. THE FLORIDA DEATH PENALTY - SENTENCING PROCEDURE WAS APPLIED TO PETITIONER IN AN ARBITRARY AND CAPRICIOUS MANNER WHICH VIOLATED PETITIONERS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.	3 - 8
II. WHERE A DEATH PENALTY IS IMPOSED ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, OF WHICH THREE IS INVALID AND ON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE, THE DEATH PENALTY SHOULD BE SET ASIDE.	8 - 10
CONCLUSION	11
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Armstrong v. State 399 So.2d 953	9
Barclay v. State 362 So.2d 657	1
Barclay v. State 343 So.2d 1266	1,2
Barclay v. State 343 So.2d 1270	7
Barclay v. State 343 So.2d 1271	7
Barclay v. State _____So.2d_____	1,3,5
Beck v. Alabama 447 U.S. 625 (1980)	9
Demps v. State 359 So.2d 501 (1981)	9
Ellege v. State 343 So.2d 1270	7,9,10
Francois v. State 407 So.2d 885 (Fla. 1982)	9

Furman v. Georgia 408 U.S. 238 (1972)	8,9
Gardner v. Florida 430 U.S. 439 (1977)	2
Godfrey v. Georgia 446 U.S. 420 (1980)	9
Gregg v. Georgia 428 U.S. 187 (1976)	8
Hargrave v. State 366 So.2d 1 (Fla. 1979)	9
Lewis v. State 377 So.2d 640 (Fla. 1979)	6
Lockett v. Ohio 437 U.S. 586 (1978)	10
Mikenas v. State 367 So.2d 606 (Fla. 1979)	5
Proffitt v. Florida 428 U.S. 242 (1976)	3,7,8
Sawyer v. State 383 So.2d 680 (1975)	8,9.10
Sireci v. State 399 So.2d 964 (Fla. 1981)	9
State v. Dixon 283 So.2d 583 (1980)	4
Stephens v. Zant 631 F.2d 397 (1980)	10
Williams v. State 386 So.2d 583 (1980)	4
Zant v. Stephens _____ U.S. _____ (1982)	10

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ELWOOD BARCLAY,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The original opinion of the Florida Supreme Court is reported as **Barclay v. State**, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a Gardner hearing is reported as **Barclay v. State**, 362 So.2d 657 (Fla. 1978). The opinion issued by the Florida Supreme Court after resentencing, is not yet reported. See **Barclay v. State**, _____ So.2d _____(Fla. 1982). (Appendix); the order denying a petition for rehearing is not yet reported. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix).

JURISDICTION

The judgment of the Florida Supreme Court was entered June 4, 1981. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix). A timely petition for rehearing was filed, and the Florida Supreme Court entered a judgment April 14, 1982. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix). This petition for certiorari has been filed within the allowable sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. & 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Cons. amend VII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Cons., amend XIV povides:

> Section 1. . . . nor shall any state deprive any person of life, liberty or property without due process of law; . . .

Fla. Stat. Ann Section 921.141.

STATEMENT OF THE CASE

Petitioner, Elwood Barclay, was tried in the Circuit Court of Duval County, Florida, for the murder of Steven Orlando and, on March 3, 1975, the jury returned a verdict of guilty of first degree murder. During the sentencing phase, no additional evidence was presented to the jury as to Barclay; the jury recommended that Barclay be sentenced to life.

The trial court received a pre-sentence investigation to aid him in his sentencing determination. On April 10, 1975, the trial court rejected the jury's recommendation of life and imposed a sentence of death. Barclay appealed to the Florida Supreme Court; however, Barclay's counsel on that appeal did not brief nor argue the propriety of the death sentence; whether the recommendation of life should have been followed; whether the trial court's findings as to certain statutory aggravating circumstances was correct.

On March 17, 1977, the Supreme Court of Florida entered its opinion affirming the conviction and death sentence of petitioner. **Barclay v. State**, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 893 (1978). The petition for certiorari did not raise the issues of the invalidity of aggravating circumstances found by the trial court or any other issues contained in this petition.

On September 7, 1978, the Florida Supreme Court vacated the death sentence of petitioner and ordered the trial court to hold a hearing as provided in **Gardner v. Florida**, 430 U.S. 439 (1977).

After hearings in the trial court, the trial judge issued a written sentence which contained the court's findings as to statutory aggravating and mitigatng circumstances. The trial court found that the aggravating circumstances outweighed the mitigating circumstances; the trial judge rejected the life recommendation and sentenced the petitioner to death.

Barclay appealed to the Florida Supreme Court, and on June 4, 1981, that court issued its judgment affirming the death penalty, on the basis that nothing had been presented to relent the information contained in a presentence investigation; the Court adhered to its first opinion. Barclay v. State, _____ So.2d _____ (1981). (Appendix).

A timely petition for rehearing was filed, and, on April 14, 1982, the Florida Supreme Court entered its judgmnt denying a rehearing by a three to three vote. Barclay v. State, _____ So.2d _____ (Fla. 1982). (Appendix _____).

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

Petitioner took a direct appeal from the trial court challenging the errneous and arbitrary findings of three aggravating circumstances and one nonstatutory aggravating circumstance. After the affirmance, petitioner filed a petition for rehearing raising the following issues:

WHERE A DEATH PENALTY IS IMPOSED ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, OF WHICH THREE IS INVALID AND ON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE, THE DEATH PENALTY SHOULD BE SET ASIDE.

The Florida Supreme Court denied the petition for a rehearing by a three to three vote.

THE FLORIDA DEATH PENALTY SENTENCING - PROCEDURE WAS APPLIED TO PETITIONER IN AN ARBITRARY AND CAPRICIOUS MANNER WHICH VIOLATED PETITIONERS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court examined the Flordia death penalty sentencing procedures - Fla. Stat. Ann. Sec. 921.141 (Supp 1976-1977) - and found the statute to meet the constitutional requirements that Florida death penalties will not be imposed in an arbitrary or capricious manner. This Court placed great reliance on Florida's procedure of appellate review by the Florida Supreme Court to minimize the risk of arbitrary and capricious death sentencings. Although this Court found the death penalty sentencing procedure constitutionally valid, that procedure has been applied in an arbitrary and capricious manner in this case in violation of Petitioner's Fourteenth Amendment Due Process Rights.

Section 921.141, Florida Statute Ann. (1976-1977 Supp.) sets forth eight statutory aggravating circumstances.

(a) The capital felony was committed by a convict under sentence of imprisonment.

Aggravating circumstances in Florida must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973); cert. denied, 416 U.S. 943 (1974). Again, in the two appellant opinions, the Florida Supreme Court did not find that this was not a properly found aggravating circumstance.

The trial court found the existence of another erroneous aggravating circumstance - the defendant was previously convicted of another capital felony or a felony involving the use of threat or violence to the person. Section 921.141(3)(b). The trial court determined:

> The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into. (Appendix).

There was no proof introduced before the trial court as to the breaking and entering conviction; this information appeared on the pre-sentence investigation.

In **Williams v. State**, 386 So.2d 538, (1980), the trial court found that the defendant has previously been convicted of armed robbery and that this established the aggravating circumstance under section 941.121(3)(b). This information, as the conviction information in this case, was gleaned from a pre-sentence investigation.

In **Williams v. State, supra**, the Florida Supreme Court held that the finding as to the section 941.121(3)(b) aggravating circumstance was defective because the state offered no evidence of the conviction in the trial or sentencing phase to prove the prior convictions. The Court held that the State must prove every aggravating circumstance beyond a reasonable doubt and that the trial judge should not have considered this circumstance in his sentence based solely on information contained in the pre-sentence investgation.

In this case, the Florida Supreme Court, in its two opinions, neither discussed nor found this aggravating circumstance to be defective.

The trial court further found that the defendant created a great risk of death to many persons and that the aggravating circumstance under section 921.141(3) existed. (Appendix). The trial court concluded that Barclay and the other defendants drove around Jacksonville looking for a victim or victims and, therefore, exposed every citizen to a great risk of death - on the trial court's theory that every person was a potential

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) At the time the capital felony was committed the defendant also committed another capital felony.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary or kidnapping.

(f) The capital felony was committed for the purpose of avoiding or preventin a lawful arrest or effecting an escape from custody.

(g) The capital felony was committed for pecuniary gain.

(h) The capital felony was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

Section 921.141 and Florida case law provide that the trial judge may consider only statutory aggravating circumstances; this was not done in this case. Section 921.141(4Xa) provides that the fact that the defendant has no significant history of prior criminal activity is a mitigating circumstance.

In its sentencing order, the trial court found that petitioner had an extensive criminal record and concluded that that fact created an aggravating circumstance rather thathan a mitigating circumstance (Appendix). This consideration by the trial court was completely erroneous, for the Florida Supreme, in **Mikenas** v. **State**, 367 So.2d 606 (Fla. 1979), cert. denied, U.S. (19) expressly held that the only aggravating circumstance that a trial court may consider is deciding to impose the death penalty are those contained in section 921.141(3). Although this finding is blatantly invalid, in neither appellant decision did the Florida Supreme Court consider that a nonstatutory aggravating circumstance had been placed in the weighing process by the trial court. **Barclay** v. **State**, supra; **Barclay** v. **State**, after the Gardener remand. (Appendix).

The trial court found that a statutory aggravating circumstance existed under section 921.141(3)(a) - the capital felony was committed by a convict under sentence of imprisonment. The trial court acknowledged that petitioner was not under sentence of imprisonment at the time of the commission of the murder; however, the Court found that the criminal record of petitioner was an aggravating circumstance. (Appendix).

victim. The trial court further found that tapes which were sent to the television stations were an open call for racial war and revolution; therefore, if the call for revolution had been successful, countless numbers would have died - it "boggles the mind".

The evidence in this case shows that one person - Steven Orlando - was killed. If the trial judge's reasoning is followed, every time a robber goes out to rob a convenience store or gas station, the robber is creating a great risk of death to many persons simply because every convenience store employee or every gas station employee in the area could be the potential victim. The construction placed upon this aggravating circumstance was not intended by the legislature and has not been given that construction in other cases by the Florida Supreme Court.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), this court reversed a death sentence to life where there was a recommendation of death by the jury. The trial court found that the fact five shots were fired at the victim while two other employees were near in a bakery and other employees were in the building near a heavily traveled intersection created a great risk of death to many persons.

The court found that the trial court had erred in making the finding that the defendant had created a great risk of death of many persons. The Florida Supreme Court held:

> When the legislature chose the words with which to establish this aggravating circumstances, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many", the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many persons.
>
> Id. at 1009-10

See also, Lewis v. State, 377 So.2d 640 (Fla. 1979).

The trial court's reliance on the tape recordings as constituting a "great risk of death to many persons" is misplaced because the publication of the tape recordings was not part of the res gestae of the Orlando murder. It is only conduct surrounding the capital felony for which a defendant is being sentenced which properly may be considered in determining whether a defendant created a "great risk of death to many

person". Elledge v. State, 346 So.2d 998 (Fla. 1977). In this case, the publication of the tapes were remote in time, and therefor, should not have been considered as an aggravating circumstance.

The Florida Supreme Court, in its original decision in this case, found that the trial court noted five aborted attempts to select a victim from the streets of Jacksonville before Orlando was chosen; the court approved the finding of the aggravating circumstance. A renewed, thorough examination of the construction placed on this circumstance does not justify that finding.

In its original opinion, the Florida Supreme Court found:

> The trial judge here painstakingly and with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. His thorough analalysis is precisely the type we would expect from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases.
>
> **Barclay v. State,**
> **343 So.2d 1271**

It is critical for this Court to review the trial court's sentencing order to understand the extent this trial judge allowed his personal feelings to intrude into the setencing procedure. (See Appendix and).

The trial jury in this case recommended petitioner receive a life sentence; the trial court and Florida Supreme Court did not follow that recommendation. In affirming petitoner's death sentence, the Supreme Court praised the trial judge:

> "The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. . . "
>
> **Barclay v. State**
> **343 So.2d 1270.**

In Proffitt v. Florida, supra, this Court found the Florida capital sentencing procedure to meet the constitutional test; however, since Proffitt, the Florida Supreme Court has failed in its duty to "review and reweigh the aggravating and mitigating circumstances to determine independently whether the ultimate penalty is warranted. It should be apparent that, in this case, there was no meaningful review.

Where discretion is afforded a sentencing body on a matter so grave as the determination as to whether a human life should be taken or spared, that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 187 (1976). One can perhaps understand the trial court's misapplication of the three aggravating circumstances and the one nonstatutory aggravating circumstance in this case in his zeal to give the petitioner the death penalty; but one cannot excuse the Florida Supreme Court for its failure to correct the trial court's error and to "suitably direct and limit the discretion" of trial judge's in Florida. In this case, the Florida Supreme Court has engaged in precisely the "cursory or rubber stamp review" that the joint opinion in Proffitt trusted would not occur.

The Florida courts, in the application of the Florida capital sentencing procedure in this case, has exhibited blatant disregard for the standards devised to regulate imposition of the death penalty and has called into question the very basis for this court's approval of that procedure in Proffitt. This Court should grant the Petition for Certiorari.

POINT TWO

WHERE A DEATH PENALTY IS IMPOSED ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, OF WHICH THREE IS INVALID AND ON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE, THE DEATH PENALTY SHOULD BE SET ASIDE.

This case presents a clear and direct conflict between the Florida Supreme Court and this Court.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court upheld the constitutionality of the Florida death penalty sentencing procedure. In footnote 8 of that opinion, this Court stated:

> "In one case, the Florida Court upheld a death sentence where the trial court had simply listed six aggravating factors as justification fr the sentence he imposed. Sawyer v. State, 313 So.2d 680 (1975). Since there were no mitigating factors, and since some of those aggravating factors arguably fell within the statutory categories it is unclear whether the Florida Court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so since the capital sentencing statute explicitly provides that '(a) aggravating circumstances shall be limited to the following (eight specified factors); section 921.141(5) (Supp. 1976-1977). (Emphasis added). There is no such limiting language introducing the list of statutory mitigating factors. . ."

The law in Florida is well settled that a death sentence will be affirmed by the state supreme court so long as there is at least one statutory aggravating circumstance and there are no mitigating circumstances, although the sentence was predicated in part upon nonstatutory aggravating circumstances and/or improperly found statutory aggravating circumstances. Elledge v. State, 346 So.2d 998, (Fla. 1977); Hargrave v. State, 366 So.2d 1, (Fla. 1979), Demps v. State, 359 So.2d 501 (1981), Armstrong v. State, 399 So.2d 953, (Fla. 1981); Sireci v. State, 399 So.2d 964 (Fla. 1981) Tafero v. State, 403 So.2d 355 (Fla. 1981); Francois v. State, 407 So.2d 885, (Fla. 1982). This Florida rule is based on footnote 8 of Proffitt v. Florida:

> "It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated byour statute." Elledge v. State, 346 So.2d at 1002-03 (Fla. 1977); Demps v. State, 395 So.2d 506 (Fla. 1981).

In point one, petitioner has demonstrated that the trial court considered one nonstatutory aggravating factor - petitioner had a prior criminal record - and that the trial judge erroneously found three statutory aggravating circumstances to exist: petitioner was under sentence of imprisonment; petitioner created a great risk of death to many persons; petitioner had previously been convicted of a felony involving the use of threat of violence to another. The presence of the nonstatutory aggravating circumstances and the erroneous application of three other aggravating factors permitted arbitrary and discretionary influences into this sentence as to violate petitioner's Fourteenth Amendment Rights.

Certain principles affirmed by this court establish the violation of petitioner's constitutional rights. An unbroken line of cases since Furman v. Georgia, 408 U.S. 238 (1972), requires any state wishing to impose a capital sentence to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980). Special capital sentencing requirements derive from the Court's recognition that there is a significant constitutional difference between the death penalty and lesser punishments. Beck v. Alabama, 447 U.S. 625 (1980); this

qualitative difference calls for a greater degree of reliability when the sentence of death is imposed. Lockett v. Ohio, 437 U.S. 586 (1978).

The consideration by the trial judge in this case of the nonstatutory aggravating factor and the three invalid statutory circumstances violated each of these procedural requirements. The erroneous consideration by the trial judge here is identical with the consideration by the jury in Zant v. Stephens, _____U.S. _____(1982) of an unconstitutional aggravating circumstance. The Fifth Circuit Court of Appeals found that because of the consideration by the Stephens jury of the unconstitutional aggravating circumstance, it could not be determined with the degree of certainty required in capital cases that the evidence of those convictions together with the instructions did not make a critical difference inthe jury's decision to impose death. Stephens v. Zant, 631 F.2d 397 (1980). The same considerations apply to the death sentence imposed on petitioner.

In Proffitt v. State, supra, this Court found:

> "The Florida capital - sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner. Moreover to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumsances is reviewed and reweighed bythe Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted'. . . Proffitt v. State, supra, at 252-53.

As can be seen by the sentencing order and the Florida Supreme Court's opinion in this case, this Court's confidence in the Florida capital sentencing procedure was misplaced. The adoption of the rule of Elledge v. State, supra, has introduced arbitrariness and capriciousness into the Florida death - sentencing procedure. Unlike the situation in Zant v. Stephens, _____ U.S. _____ (1982), this Court does not have to question whether the Florida Supreme Court will sustain a death penalty as long as one of a plurality of aggravating circumstances found by a judge is valid and supported by the evidence.

Although this Court has not decided the Zant v. Stephens, supra, issue on the merits, the sentencing infirmities addressed in Zant by this Court are identical to the infirmities in the Florida capital - sentencing procedure as applied to this case. This Court should grant this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petiton for Writ of Certiorari has been furnished to the Attorney General's Office by mail this 14th day of June, 1982.

Elwood Barclay

Elwood Barclay, in proper person
437 East Monroe Street
Jacksonville, Florida 32202

81 6908

INDEX TO APPENDIX

	Page
Original Opinion, Barclay v. State, 343 So.2d 1266 (Fla. 1977)	1
Opinion after resentencing of Gardner remand, Barclay v. State, unreported	8
Order denying Petition for Rehearing, Barclay v. State, unreported	12
Sentencing order of trial court - Barclay v. State	13

RECEIVED
JUN 16 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Edward Clark BARCLAY and Jacob John Dougan, Jr., Appellants,

v.

STATE of Florida, Appellee.

No. 47200.

Supreme Court of Florida.

March 17, 1977.

Rehearing Denied April 7, 1977.

Defendants were convicted in the Circuit Court, Duval County, R. Hudson Offill, J., of murder in first degree and sentenced to death and they appealed. The Supreme Court held that statutes authorizing imposition of death penalty on those convicted of first-degree murder and adopting new capital-sentencing procedure are not unconstitutional nor were they unconstitutionally applied to defendants; that defendants were properly tried in Duval County in which victim got into defendants' car, although killing occurred in another county, and that trial judge properly rejected contention that one of defendants received his sentence.

Affirmed.

Boyd, J., concurred specially with an opinion.

Hatchett, J., concurred in part and dissented in part with an opinion.

1. Homicide ⇐351

Florida statutes authorizing imposition of death penalty on those convicted of first-degree murder and adopting new capital-sentencing procedure are not unconstitutional and were not unconstitutionally applied to defendants convicted of first-degree murder of hitchhiker randomly chosen as victim. West's F.S.A. §§ 782.04, 921.141.

2. Criminal Law ⇐112(6)

Defendants were properly tried for first-degree murder in county in which hitchhiker victim got into their car, even though he was killed in another county. West's F.S.A.Const. art. 1, § 16; West's F.S.A. § 910.05.

3. Criminal Law ⇐706(3)

Defendants convicted of first-degree murder were not denied fair and impartial trial on basis that prosecuter failed to reveal on direct examination complete details of plea bargain agreement with witness in exchange for his testimony, where defense counsel, although aware of agreement, did not ascertain whether any bargain had been made and did not cross-examine him to shake his credibility because of plea bargain agreement.

4. Homicide ⇐334

Imposition of death penalty for first-degree murder was appropriate, where defendant, who was age 27 at the time, was not under mental or emotional disturbance or duress or dominance of another person and had full capacity to appreciate criminality of his conduct and to conform his conduct to the law and he conceived and planned especially heinous, atrocious and cruel murder. West's F.S.A. § 921.141(6).

5. Criminal Law ⇐983

Although jury recommended that one of two defendants convicted of first-degree murder be sentenced to death and the second defendant be given life sentence, trial judge's imposition of death sentence on both was appropriate, where they participated equally in the crime and variation between the defendants were nominal, a minor age difference. West's F.S.A. § 921.141(6).

Ernest D. Jackson, Sr., of Jackson & Nicks, Jacksonville, for appellants.

Robert L. Shevin, Atty. Gen., and William K. Allbritton, Asst. Atty. Gen., for appellee.

PER CURIAM.

We have for review on direct appeal from the Circuit Court of Duval County, judgments of guilty of murder in the first degree and sentences of death. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

Appellants were indicted for the first degree murder of Stephen Anthony Orlando, were found guilty by a jury who after advisory hearing recommended that the death sentence be imposed as to Dougan and that life imprisonment be imposed as to Barclay,[1] were convicted and sentenced to death.

As evidenced by the sentencing order of the trial judge and supported by the record, the facts surrounding the slaying which the judge characterized as a random, racial hate murder are as follows:

"The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

"The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill a 'devil'. The devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote out a note which was to be placed on the body of the victim ultimately chosen for death.

"Eventually the five men headed for Jacksonville Beach where they picked up a hitch hiker, eighteen year old, Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice—once in the chest and once in the ear killing him instantly. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

"The evidence showed that none of the defendants knew or had ever seen Orlando before, they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

"'Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.'

"Early the following morning the dead body of Stephen Anthony Orlando was

1. As to Barclay, the jury recommended life by a vote of seven to five

discovered—police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and surrounding area. An F.B.I. document and handwriting expert compared the death note with other handwriting of Dougan and testified that they were both written by the same person.

"Subsequent to the murder the defendants Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the Mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all—as follows:

"'Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed. . . .

"'If you want to know how to spell 'Americans,' just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so the black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods . . . .'

"'Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom . . . .

"'You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people . . . .

"'We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offsprings, those things, those stringy-haired things you call your kids . . . You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain . . . .

"'The reason Stephen was only shot twice in the head was because we had a five pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes . . . .

"'He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on those people, my people.

"'We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla.'

"All of the tapes ended, 'Signed, Your Black Liberation Army.'"

In detail, the Judge explained each of the aggravating and mitigating circumstances defined by statute and their application to the instant cause, and concluded that the death penalty was the appropriate punishment for appellants. As to the aggravating circumstance of heinousness or atrocity of the crime, the trial judge stated:

"The defendants, Barclay and Dougan, together with others premeditatedly and deliberately stalked their victim and brutally murdered him.

"The victim's only crime was that he was of a different racial group than his murderers. That he in no way offended them nor did he even know them before that fatal evening.

"The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

"In addition to an unprovoked, premeditated murder—it was a declaration of war against a racial group—with the promise of more violence, death and revolution to come.

"Such acts of the defendants were of the basest, most callous, homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrators."

We have carefully considered each of the numerous points raised on appeal by appellants and find that none of them constitute reversible error.

[1] Sections 782.04 and 921.141, Florida Statutes, are not unconstitutional nor were they unconstitutionally applied to appellants. *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *Alford v. State*, 307 So.2d 433 (Fla. 1975), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, decided July 2, 1976.

Relative to appellants' argument that they were denied the right to be tried in the county where the crime occurred, we initially note the following excerpt from the record taken from the hearing on motion for new trial:

"THE COURT: Insofar as the motions made by Mr. Jackson are concerned, the Court ruled upon the issue of the trial in Duval or St. Johns County, finding from the evidence that the incident occurred in Duval County, culminated in St. Johns County; read the specific statute with further instructions to the jury as to that particular aspect of the law. There has been no motion for change of venue insofar as St. Johns County was concerned or motion for change of venue to any other county. The evidence showed that the defendant got in the car, whether it was an abduction, kidnapping or whatever, it started in Duval County and then culminated in St. Johns County."

[2] The indictment charged that appellants "in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design did kill the said Stephen Anthony Orlando." The State cites the Court to Article I, Section 16, Florida Constitution, providing:

"If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient."

and Section 910.05, Florida Statutes, providing:

"If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred."

Appellants were properly tried in Duval County, for the reasons well expressed by

Judge Smith with respect to one of Dougan's and Barclay's co-ventures. *Patterson v. State*, 336 So.2d 1168, opinion filed October 11, 1976 (Fla. 1st DCA).

[3] Appellants contend that they were denied a fair and impartial trial because the prosecutor failed to reveal on direct examination complete details of a plea bargain agreement with a witness in exchange for his testimony. The State emphatically denies that the prosecution ever at any time deliberately and intentionally withheld any of witness Hearn's statement. No false testimony was given in this regard as is suggested by appellants. During the motion for new trial, appellants charged that the State willfully refused to disclose the full plea bargain agreement on direct examination. To this charge, State Attorney Austin expressly objected, as follows:

"MR. AUSTIN: Your Honor, I'm—just a minute. I'm just going to make an objection that that's a bad faith argument; that this lawyer knows if Hearn had opened his mouth about the second murder it would have been a mistrial, and he knows it and he had a perfect right to cross examine on it. He didn't open the door because he knows it would prove that his man was guilty of two murders instead of one to the same jury, and I'll submit that it's a bad faith argument."

Although completely aware of the agreement, defense counsel never inquired of the subject State witness as to any bargain or deal or representations made to him by the State Attorney's office, nor did he on cross examination attempt to shake the credibility of this witness because of the plea bargain agreement mentioned on direct examination. Defense counsel, on cross examination, did not even mention the agreement that had been elicited on direct examination. As is clearly evidenced by the record, without question, defense was fully aware of the full plea bargain agreement. At the insistence of defense counsel, the deposition of Hearn was taken on January 31, 1975, at 10:20 a. m. in the Duval County Courthouse at which time Hearn testified fully to the details of the agreement thereby apprising the defense of the same.

Appellants raise several other points on appeal none of which we find to be meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and pursuant to Rule 6.16(b), Florida Appellate Rules, we have also reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and that the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Having determined that no reversible error has been made to appear which would require a new trial, we must proceed to examine whether the death sentences imposed by the trial judge were appropriate under the peculiar circumstances of this case.

The jury in these cases distinguished between the appellants in presenting their recommendations for sentence, suggesting life imprisonment for Barclay and a death penalty for Dougan. It is particularly important, therefore, that we explain our decision to uphold the recommendation of the trial judge that both be executed.

[4] The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. He noted as to Dougan that no mitigating circumstance pertained to his benefit, and that one of those factors actually suggested an aggravation rather than mitigation of sentence.[2] Dougan, who was age 27 at the time, had no significant history of prior criminal activity, was not (and did not claim to be) under a mental or emotional disturbance, was not (and did not claim to be) under duress or the dominance of anoth-

2. See Section 921.141(5), Fla.Stat. (1975).

Judge Smith with respect to one of Hearn's and Barclay's co-venturers. Cottingham v. State, 338 So.2d 1099, opinion filed October 11, 1976 (Fla. 1st DCA).

[3] Appellants contend that they were denied a fair and impartial trial because the prosecutor failed to reveal on direct examination complete details of a plea bargain agreement with a witness in exchange for his testimony. The State emphatically denies that the prosecution ever at any time deliberately and intentionally withheld any of witness Hearn's statement. No false testimony was given in this regard as is suggested by appellants. During the motion for new trial, appellants charged that the State willfully refused to disclose the full plea bargain agreement on direct examination. To this charge, State Attorney Austin expressly objected, as follows:

"MR. AUSTIN: Your Honor, I'm—just a minute. I'm just going to make an objection that that's a bad faith argument; that this lawyer knows if Hearn had opened his mouth about the second murder it would have been a mistrial, and he knows it and he had a perfect right to cross examine on it. He didn't open the door because he knows it would prove that his man was guilty of two murders instead of one to the same jury, and I'll submit that it's a bad faith argument."

Although completely aware of the agreement, defense counsel never inquired of the subject State witness as to any bargain or deal or representations made to him by the State Attorney's office, nor did he on cross examination attempt to shake the credibility of this witness because of the plea bargain agreement mentioned on direct examination. Defense counsel, on cross examination, did not even mention the agreement that had been elicited on direct examination. As is clearly evidenced by the record, without question, defense was fully aware of the full plea bargain agreement. At the insistence of defense counsel, the deposition of Hearn was taken on January 31, 1975, at 10:30 a. m. in the Duval County Courthouse at which time Hearn testified fully to the details of the agreement thereby apprising the defense of the same.

Appellants raise several other points on appeal none of which we find to be meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and pursuant to Rule 6.16(b), Florida Appellate Rules, we have also reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and that the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Having determined that no reversible error has been made to appear which would require a new trial, we must proceed to examine whether the death sentences imposed by the trial judge were appropriate under the peculiar circumstances of this case.

The jury in these cases distinguished between the appellants in presenting their recommendations for sentence, suggesting life imprisonment for Barclay and a death penalty for Dougan. It is particularly important, therefore, that we explain our decision to uphold the recommendation of the trial judge that both be executed.

[4] The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. He noted as to Dougan that no mitigating circumstance pertained to his benefit, and that one of those factors actually suggested an aggravation rather than mitigation of sentence.[2] Dougan, who was age 27 at the time, had no significant history of prior criminal activity, was not (and did not claim to be) under a mental or emotional disturbance, was not (and did not claim to be) under duress or the dominance of another

2. See Section 921.141(6), Fla.Stat. (1975).

or person and had (and did not deny having) full capacity both to appreciate the criminality of his conduct and to conform his conduct to law. The trial judge further found that Dougan's victim was not a participant in the episode and had not consented to the act, but that Dougan was an accomplice with four others in this crime and had a dominant, as opposed to minor role, in its accomplishment. It was Dougan who conceived and planned the events that occurred. Each of these findings is well documented in the record of Dougan's trial.

As to aggravating circumstances relative to Dougan, the trial judge recited that four factors essentially had no relevance here.[3] Four others were present to some degree, namely that Dougan's crime had created a great risk of death to many persons[4], had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement[5], and had been especially heinous, atrocious and cruel.[6] These findings are also well documented in the record before us. On balance, there is no doubt that the recommendation of the jury and the sentence of the trial judge are appropriate in his case.

[3] As regards Barclay, who had received a life recommendation from the jury, virtually the same considerations apply with respect to consequences of the criminal episode. Different personal factors pertain, however. He was 23 rather than 27 years old, but had amassed a significant history of prior criminal activity. His participation, like Dougan's, was found by the trial judge not to be minor, as he was the first to assault the victim and then stab him repeatedly. The jury obviously weighed these differences somewhat differently than the trial judge.

When there is disagreement between the jury and judge after both have evaluated the same data, we have said the jury's recommendation should generally prevail.[7] In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld.[8] Two perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being an eighteen (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice. *See Mosser v. State*, 330 So.2d 137 (Fla.1976); *Slater v. State*, 316 So.2d 539 (Fla.1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Accordingly, the judgments and sentences of the trial court are hereby affirmed.

It is so ordered.

---

2. Dougan was not under sentence of imprisonment, was not attempting to avoid arrest or escape custody, had not been previously convicted of a major felony, and had not acted for pecuniary gain.

4. The trial judge noted five shotgun blasts to subject a victim from the streets of Jacksonville before Stephen Orlando was chosen, plus the taped threat made to white Jacksonville citizens that a race war had begun and none would be safe.

5. The basis for this finding was the judge's observation that the racism of a race war essentially threatened the foundations of American society.

6. Dougan's tapes explained how Stephen Orlando had begged for his life while being beaten and stabbed before Dougan "executed" him with two pistol shots to the head.

7. Tedder v. State, 322 So.2d 908 (Fla.1975).

8. The trial judge here painstakingly met with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. His thorough analysis is precisely the type we would expect from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases.

OVERTON, C. J., and ADKINS, ENGLAND and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs specially with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring specially.

The jury found both Appellants guilty of murder in the first degree, but recommended death by electrocution for Appellant Dougan and a sentence of life imprisonment without eligibility for parole during the first twenty-five years for Appellant Barclay.

A careful review of the entire record convinces me the jury was correct in recommending a higher degree of punishment for Appellant Dougan than for Appellant Barclay. Appellant Dougan was the architect of this atrocity, planned the crime and lured his heroin students on the night of the murder, directed the course of the auto trip of the defendants and selected the victim to be killed. Appellant Barclay was a principal and is guilty of murder, but he was a follower who did exactly what he was told to do by Appellant Dougan and I feel that he should be granted a life sentence rather than death. Dougan fully deserves electrocution.

HATCHETT, Justice, concurring in part and dissenting in part.

The murder in this case was heinous, atrocious, cruel, and cold, senseless.

Section 921.141, Florida Statutes (1975), "intended as it was ... to meet the constitutional infirmity of capital sentencing procedures explored in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." *Provence* v. *State*, 337 So.2d 783 (Fla.1976). In a capital case a judicial officer must evaluate the conduct of the defendant by weighing specifically enumerated aggravating and mitigating circumstances, taking into consideration prior judicial treatment of similar situations. The aggravating circumstances are limited to those listed in the statute.

The record in this case shows that the trial judge went beyond the statute and considered additional factors outside the record, including his own personal experiences, thus upsetting the balance mandated by the statute. We cannot properly perform our duty of review in capital cases and ensure uniform imposition of the death penalty if trial judges are allowed to supplement the list of factors found by the legislature to be determinative.

For this reason I would affirm the conviction and remand the case to the trial judge for the entry of sentences in accordance with Section 921.141, Florida Statutes, under the authority of *Miller* v. *State*, 332 So.2d 65 (Fla.1976), and *Messer* v. *State*, 330 So.2d 137 (Fla.1976).

Supreme Court of Florida

No. 47,260

ELWOOD CLARK BARCLAY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[June 4, 1981]

PER CURIAM.

This case returns to us following our remand to the trial court in order to provide Barclay an opportunity to rebut or explain matters appearing in a presentence investigation report (PSI). Barclay v. State, 362 So.2d 657 (Fla. 1978). Before that remand, Barclay's conviction and sentence for first degree murder had been affirmed by this Court,[1] and review of that action had been denied by the United States Supreme Court.[2]

On remand Barclay was afforded several evidentiary hearings and argument of counsel. Only one witness was called on Barclay's behalf at the first hearing, principally to portray Barclay's lesser role in the events surrounding the murder, and to comment on a second murder with which he was not involved. At a second hearing, Barclay's counsel argued extensively against the reimposition of the death penalty, but offered virtually no evidence in derogation of the information contained in the PSI. The trial judge concluded during a later sentencing proceeding

1. Barclay v. State, 343 So.2d 1266 (Fla. 1977).

2. Barclay v. Florida, 439 U.S. 892 (1978).

that he had "carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and [found] nothing in such responses which mitigates any circumstance herein." Our independent review of the record in this case completely supports this conclusion.

Barclay now challenges the reimposition of a death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the "law of the case". See Duncan v. State, No. 47,260 (Fla. April 9, 1981). The dictates of Gardner v. Florida, 430 U.S. 349 (1977), have been met, and no defect in the original sentencing order has been identified as stemming from improper material in the PSI. There being no reason to reconsider the matters previously analyzed, we again affirm the trial judge's sentence of death.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD, ENGLAND and ALDERMAN, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,

R. Hudson Olliff, Judge - Case No. 74-4139-CF

Kenneth Vickers and Steven E. Rohan of Vickers and Rohan, Jacksonville, Florida,

for Appellant

Jim Smith, Attorney General, and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Supreme Court of Florida

WEDNESDAY, APRIL 14, 1982

ELWOOD CLARK BARCLAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,260

Circuit Court No. 74-4139-CF
(Duval)

There not being four (4) votes to rehear, the Motion for Rehearing filed in the above case is hereby denied.

ADKINS, Acting C.J., BOYD and ALDERMAN, JJ., would deny rehearing
OVERTON, McDONALD and EHRLICH, JJ., would grant rehearing

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By Tanya Carroll
Deputy Clerk

TC
cc: Hon. S. Morgan Slaughter, Clerk
Hon. R. Hudson Olliff, Judge

Wallace E. Allbritton, Esquire
Kenneth Vickers, Esquire

INDEX

1.	SUMMARY OF PROCEEDINGS - from date of crime to date	Pages 2-5
2.	SENTENCE TECHNIQUE	Page 6
3.	COMMENTS OF JUDGE	Pages 7-9
4.	OUTLINE OF THE ESSENTIAL FACTS	Pages 10-14
5.	EXPLANATION	Page 15
6.	MITIGATION ELEMENTS	Pages 16-22
7.	AGGRAVATING ELEMENTS	Pages 23-31
8.	COMMENT	Page 31
9.	CONCLUSION OF COURT	Page 32
10.	AUTHORITY FOR SENTENCE	Page 32
11.	CONTENTS OF NOTE STUCK TO VICTIM'S BODY	Page 11 Page 27
12.	CONTENTS OF TAPES SENT TO MEDIA AND VICTIM's MOTHER	Pages 12-13 Pages 28-29
13.	SENTENCE	Page 35

SUMMARY OF PROCEEDINGS

That because there has been a lapse of approximately five years since I originally imposed sentence upon this defendant - it may be well to summarize the facts from indictment to the date hereof - for the benefit of review by the Florida Supreme Court.

1. On September 26, 1974, the defendants, ELWOOD CLARK BARCLAY, JACOB JOHN DOUGAN, DEVNE CRITTENDON and BRAD W. EVANS, were indicted for murder in the first degree, as follows:

"IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM, ONE THOUSAND NINE HUNDRED AND SEVENTY-FOUR

STATE OF FLORIDA

vs.

JACOB JOHN DOUGAN, JR.,
ELWOOD CLARK BARCLAY,
DEVNE CRITTENDON and
BRAD W. EVANS

INDICTMENT FOR

MURDER IN THE FIRST DEGREE

74-4139

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that JACOB JOHN DOUGAN, JR., ELWOOD CLARK BARCLAY, DEVNE CRITTENDON and BRAD W. EVANS, on the 17th day of June, One Thousand Nine Hundred and Seventy-Four, in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design to effect the death of Steven Anthony Orlando, did kill the said Steven Anthony Orlando, by shooting him to death with a pistol, contrary to the provision of Section 782.04, Florida Statutes."

2. On March 5, 1975, the defendants, Barclay, Dougan, Crittendon and Evans were convicted by Jury, as follows:

Barclay - guilty of murder in the first degree

Dougan - guilty of murder in the first degree

Crittendon - guilty of murder in the second degree

Evans - guilty of murder in the second degree

3. The jury - in its advisory sentence - recommended life imprisonment for Barclay by a vote of seven to five.

4. The jury - in its advisory sentence - recommended death for defendant Dougan by a vote of ten to two.

5. That the defendants Crittendon and Evans were sentenced by this Court to one hundred and ninety-nine years in the Florida State Prison in case 71-1139. The defendants, Crittendon and Evans also pleaded guilty in case 71-4140 and were sentenced by this Court for that case also. That subsequently the conviction and sentence of Crittendon was affirmed. (See 388 So.2d 1088.) Evans did not pursue appeal.

6. On April 10, 1975, this Court sentenced both Barclay and Dougan to death.

7. On March 17, 1977, the Florida Supreme Court affirmed the conviction and sentence of both Barclay and Dougan. (See 343 So.2d 1266.)

8. On September 7, 1978, the Florida Supreme Court vacated the death sentences and ordered this Court to hold a

hearing (as provided in Gardner v. Florida, 430 U.S. 349) at which the defendants would have an opportunity to rebut any information contained in the presentence investigation report - including any confidential or other parts thereof. (See 362 So.2d 657.)

9. On October 10, 1978, the United States Supreme Court denied certiorari to defendants Barclay and Dougan. (See 99 Supreme Court Reporter 249.)

10. That after the case was remanded to this Judge in September of 1978, Mr. Ernest Jackson, attorney for both defendants, Barclay and Dougan, was granted a number of continuances due to his terminal illness - and eventually he withdrew from representation of defendants.

11. This Court then appointed private attorney Mr. Ken Vickers to represent Barclay and Mr. Randolph Fallin to represent Dougan. That both Mr. Vickers and Mr. Fallin are skilled attorneys with wide experience in capital cases. That several continuances were granted defendants while Mr. Fallin and Mr. Vickers represented them.

12. That eventually the defendant Dougan dismissed his Court appointed attorney, Randolph Fallin, and retained the services of Joseph Nursey of the Team Defense Project, Inc., of Atlanta, Georgia. That such late entry of Mr. Nursey caused additional delay as to both defendants.

13. Subsequently both the defendants, Barclay and Dougan, filed motions to sever their cases one from the other. Such motions were granted and each responded to the presentence investigation report in separate proceedings on different dates.

Subsequently the defendant Dougan was resentenced and this Court now sentences defendant Barclay.

SENTENCE TECHNIQUE

In the sentence of April 10, 1975, this Court sentenced both the defendants, Barclay and Dougan, in one written sentence.

During the Gardner relief proceedings, both defendants made motion for - and were granted - a severance so that their responses to PSI and sentences would be separate and apart from one another.

That, accordingly, this Court has sentenced each separately. However, because both were involved in and convicted of the same crime and their participation was so entwined - one with the other - that a thorough and complete sentence could not be imposed on either without periodic reference to the other.

COMMENTS OF JUDGE

This present case is one of the rarest types of crimes to come before this Court or any Court. The facts at trial proved that it was a PREMEDITATED - RACIAL - HATRED MURDER. The hapless victim was chosen at random, stalked and brutally murdered ONLY because he was defenseless and because he was of a DIFFERENT racial group than his murderers.

After the crime, tapes were made by the murderers wherein they described the killing and the agony of the victim. These boastful tapes were cruelly mailed to the mother of the murdered boy and to local T.V. and radio stations - bragging of the murder and announcing that it was the start of a revolution and promised further violence. One part of the tapes said "White people prepare yourself to die". It was a call for, and an attempt to start a racial war.

Such ravings could only be from a depraved homicidal mind.

Similar sentiments were violently uttered on another continent in our own recent history. During World War II, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.

Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of the same crime - they were different from those people who murdered them. They were either of a different

race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust.

The law does not require that we like each other - nor is it illegal to have prejudices - but it is unlawful to do injury to another person because of that hate and prejudice.

This type of random, racial - hate murder, is almost impossible to believe. Animals hunt and kill for food and, in time of war, men kill in self defense those who would kill them. But, to premeditatedly pick a victim at random - a person not even known to his murderers - and who was chosen for death only because he was guilty of being of a different race - is heinous, atrocious, cruel and an unthinkable crime. The crime itself was horrible, but the attempt to incite racial war and a mass bloodletting - compounded the heinous quality of the murder.

We do not have to like each other - but we must respect the rights of others and we must either live together - or surely we will die together.

Jacksonville and, indeed, the nation has made great progress in race relations and understanding over the last few years. But you, who have committed this racial - hatred murder, have done more to disrupt those good relations and progress than any other one factor in recent time.

You have done a gross disservice to both the black and white citizens of this City. You have given fuel to those who want to think the worst of the people of your race - and you have caused consternation and disgust amongst both blacks and whites of good will who are most anxious to help us achieve a society of equality.

Until your arrest - terror stalked the streets of this City - and it was only due to the good will of both our black and white citizens that order prevailed and further violence and retaliatory acts were not committed.

Nothing good has, or ever will, come from the murder of Stephen Anthony Orlando, but the tragic slaughter of this eighteen year old youth can be used as an example of the monumental stupidity of racial - hatred murder.

OUTLINE OF THE ESSENTIAL FACTS

The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the "BLACK LIBERATION ARMY" (BLA) and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

The testimony shown that on the evening of June 17, 1974, Barclay, Dougan, Crittendon, Evans and Hearn set out in a car armed with a twenty-two caliber pistol and a knife with the intent to kill a "devil" - the devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

That as they drove around the City of Jacksonville they made several stops and observed a number of white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually the five men headed for Jacksonville Beach where they picked up a hitchhiker, eighteen year old Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay struck the first homicidal blow by repeatedly stabbing him with a knife. Dougan then put his foot on Orlando's head and shot him twice - once in the cheek and once in the ear. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

> *"Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."*

Early the following morning, the dead body of Stephen Anthony Orlando was discovered. Police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and surrounding area.

Subsequent to the murder - the defendants, Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all - as follows:

"Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed..."

"If you want to know how to spell 'Americans', just spell it with three K's instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so that black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again'. Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods..."

"Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom..."

"You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people..."

"We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offspring, those things, those stringy-haired things you call your kids..."

"You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain..."

"The reason Stephen was only shot twice in the head was because we had a five pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes..."

"He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people..."

"We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla."

All of the tapes ended with the words "Signed, Your Black Liberation Army".

William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the participation of Barclay, Dougan, Evans and Crittendon - and he, together with witnesses Jimmy Mattison, Edred Black and Otis Bess, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Barclay and Dougan when the tapes were played to the jury.

In defense, Barclay admitted making the tapes for political reasons - but denied any participation in the murder. Dougan also denied the murder and the death note - but admitted he made the tapes based on newspaper accounts of the crime. He said that the purpose of the tapes was to dramatize the plight of black people. Each defendant had alibis as to his whereabouts at the time of the murder, but the jury found them all guilty of murder.

The jury found both Barclay and Dougan guilty of murder in the first degree and in its advisory sentence the jury recommended death for Dougan by a vote of ten to two. In its advisory sentence the jury recommended life imprisonment for Barclay by a seven to five vote.

That thereafter this Court denied motions for a new trial and adjudged each guilty of murder in the first degree.

EXPLANATION

Before imposing the sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Barclay, in his responses to the PSI. The Court has also closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in the Florida Statutes and which were guidelines for the jury in considering its advisory sentences.

The Court has summarized the facts as brought out in the trial, in the presentence reports, in defendant's response to the presentence report and has applied them to each element of aggravation and mitigation where applicable.

The elements of Aggravation and Mitigation have been summarized below in reverse order.

SUMMARIZATION OF MITIGATION ELEMENTS

A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

FACT:

The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on probation for the crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (See PSI)

CONCLUSION:

There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

FACT:

That Barclay raised no defense of insanity or emotional instability. He had an alibi

for the time of the crime and proclaimed his innocence. Nor was there any evidence from the PSI that he suffered emotional disturbances in the past or at the time of trial. In the proceedings for response to the PSI there was no evidence or testimony that he was under the influence of extreme mental or emotional disturbance at the time of the murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is no evidence of extreme mental or emotional disturbance in the past, at the time of the murder - or at the time of trial.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE CONDUCT OF THE DEFENDANT OR CONSENTED TO THE ACT

FACT:

The defendant Barclay, together with Dougan, Crittendon and Evans, had previously decided upon a course of homicide and were looking for a victim when they spotted Stephen Anthony Orlando and offered him a ride. There was evidence and testimony that the victim urged they take him to a house - so that he could get out and away from his abductors. Instead, he was taken to a trash dump and there the unarmed youth was ordered out of the car - knocked to the ground - stabbed repeatedly by Barclay and shot by Dougan.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant Barclay and the others intended to kill Orlando at the time he got into the car. Orlando could not, and would not, in any way, consent to his own murder, and in fact, begged for mercy - all in vain.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR

FACT:

The participation by Crittendon and Evans was lesser in degree and they have been adjudged guilty of murder in the second degree and each sentenced to 199 years imprisonment.

FACT:

Both Barclay and Dougan were the major and primary participants in the murder. The evidence shows that the homicidal assault was initiated by Barclay who threw the victim to the ground and repeatedly stabbed him in the chest with a knife - as Orlando pleaded for his life. Then Dougan rendered the Coup De Grace by shooting the victim twice in the head.

A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation. Had Dougan been the only major

participant - then perhaps Orlando, who was struggling for his life, might have been able to escape. But Barclay and Dougan acting in concert overpowered, stabbed and shot their common prey.

FACT:

The evidence showed that Barclay struck the first homicidal blow of the murder by repeatedly stabbing the victim. Dougan was the originator of the plan and twice shot the helpless captive after Barclay put the killing in motion - but it was the two of them acting in concert - who were the primary culprits. Crittendon and Evans were lesser participants - which fact was recognized by the jury finding Dougan and Barclay guilty of murder in the first degree and the others guilty of second degree murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay - who initiated the homicidal frenzy and was a major participant in the murder while acting in concert with Dougan.

E. WHETHER DEFENDANT ACTED UNDER EXTREME DURESS OF UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

FACT:

Never, at any time, in any way, was it shown that any of the defendants acted under duress

of any kind. The defendant, Barclay, had a criminal record of seven arrests - showing a felony conviction, a misdemeanor conviction and a felony probation. He is, or was, a married man with several children. He had gone through senior high school and was of average, or above, intelligence. It was not contended by Barclay that he was under substantial domination of Dougan or any other person. Had such dominance been apparent, then perhaps the jury would have found Barclay guilty of a crime less than first degree murder.

FACT:

That in the responses to the presentence report the defense attorney adduced testimony from the lead investigating officer in the murder - and that officer named Barclay as second in command of the members of the Black Liberation Army. He stated that in his opinion both Barclay and Dougan exerted influence over the other members of the gang. He further stated on cross examination by the State Attorney that Barclay had leadership traits, was intelligent, acted of his own free will and was not under the domination of anyone at the time of the murder.

FACT:

That neither Barclay or Dougan were under the substantial domination of the other as they committed the dastardly murder - and each vyed to outdo the other in homicidal ferocity.

CONCLUSION:

There is no mitigating circumstance as to the defendant under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

FACT:

The defendant Barclay had been through the criminal justice system and was a convicted felon. He well understood the criminality of his conduct.

FACT:

There was never any suggestion or claim of insanity or any showing, by any evidence - at trial or in response to the PSI - that Barclay did not appreciate the criminality of his acts or that he could not conform his conduct to the requirements of the law. The evidence showed that upon setting out on a homicidal course that there was ample opportunity for Barclay to withdraw from the plot, but he and the others calculatedly and premeditatedly stalked their victim and produced his death - knowing the full consequences thereof.

FACT:

There is no evidence or testimony in trial, in response to PSI or at any other place that

ever suggests that Barclay was incapable of appreciating the criminality of his acts or conforming his conduct to the requirements of the law.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME

FACT:

The defendant Barclay was twenty-three years of age, had finished senior high school, had married in 1969, fathered five children and he and his wife were separated at the time of the crime. According to the PSI he had subsequently fathered another child by another woman, and had worked, not too successfully, at various jobs. He was a mature male, in good health, standing five feet ten inches tall and weighing one hundred and sixty pounds. He also had some expertise in karate. He was five years older and larger than his eighteen year old victim.

CONCLUSION:

There is no mitigating circumstance as to defendant under this paragraph.

SUMMARIZATION OF AGGRAVATING ELEMENTS

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED

FACT:

The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance.

B. WHETHER THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

FACT:

The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.

CONCLUSION:

This is more of an aggravating than a negative circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

FACT:

The testimony and evidence showed that Barclay and the other defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and exited areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Five persons were exposed to their planned murder and it was not out of concern for the lives of many persons that only a single victim was chosen - but rather out of concern for their own detection and capture.

The tapes made by Barclay and Dougan - which were sent to the media - were a declaration of war by the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war between a black and white population - if confined to Jacksonville - of over one-half million persons.

Barclay and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplating the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did Barclay and the other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after the murder.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB

FACT:

The only element of this aggravating circumstance applicable to this case is the crime of kidnapping which - as applicable to this case - is defined in F.S. 787.01 as:

> "(1)(a) Forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or terrorize the victim or another person."

The facts of this murder were that the defendants picked up the hitchhiking victim with intent to murder him. They refused to take him to the place requested and by force and/or threats kept him in their car until they found an appropriate place for the murder. The victim was then removed from the car - brutalized and murdered. Each essential element of kidnapping was certainly present in this case.

CONCLUSION:

There is an aggravating circumstance as to the defendant under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY

CONCLUSION:

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN

CONCLUSION:

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS

FACT:

More than any other factor, this paragraph together with the racial hatred murder - seems to have been one of the primary motives for the murder. The stalking of an innocent victim and slaughtering him only because he was of a different race than his murderers and then using a knife to stick a note on his body - which read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy therefore, you must die. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free."

This was a call to revolution. The tapes made by Barclay and the others and sent to the media was a further and more violent call for a race war and for revolution. Typical excerpts of the tapes are as follows on the next two pages.

"To the oppressive state: This is directed to enemy Mary Ann Mallory, Lt. J. A. Orlando (the victim's mother and father) and especially pig Garrett. Stephen A. Orlando was not murdered; he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.

"You white racist Americans, because your nature is that of a white devil you can never do right. So the black man's freedom depends upon your defeat or your death. The revolution will end only when you are dead or when black people are free.

"Mary Ann Mallory, you should be proud that you son, Stephen, was the first to die for our black cause. Many more will follow him until we are free. I know that pig Garrett did not want to publicize the contents of the execution note found on Stephen's dead body, but he knows that revolution is very serious. He should be alarmed for now he knows that he and people like him will have to pay for their crimes. Black people have given no support in what we are doing because you will not listen to nothing [sic] else but that which comes from the barrel of a gun.

"The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and the stomach to symbolize the 400 years of hangings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy. That's right, no mercy, for every time I pulled trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew, I knew, that the people who died because of him, because of his ancestors and because of you were now being repaid.

"Remember, white racist America, this could happen to you also as long as black people are oppressed. We as black people are no longer begging anymore. Even we will take what is ours, what is rightly ours. We created it so we should have it. The Black Liberation Army will destroy you. They will destroy everything that stands in the way of the black man's freedom. To all my black people, black warriors have emerged on the scene to show you the way to freedom and the destruction of our enemy, the white man. White people, prepare yourself to die. I am your Black Liberation Army."

FACT:

The messages and actions of Barclay and the other defendants were, in all ways, a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution.

CONCLUSION:

This is an aggravating circumstance.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

FACT:

The defendant Barclay, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

In addition to an unprovoked, premeditated murder - it was a declaration of war against a racial group - with the promise of more violence, death and revolution to come.

Such acts of Barclay and the other defendants were of the basest, most callous homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrator.

CONCLUSION:

That the murder of which the defendant Barclay was convicted was especially heinous, atrocious and cruel.

COMMENT

That the defendant Barclay did not present any matters in his responses to the PSI which mitigated the heinous, atrocious and cruel nature of this crime.

That the passage of approximately five years from the date of this murder until the date of this sentence - has not diminished the nature of this crime. Stephen Anthony Orlando was murdered and the facts of the crime and the call for bloodshed and revolution are the same.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO THE DEFENDANT ELWOOD CLARK BARCLAY.

AUTHORITY FOR SENTENCE

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon the Judge - but in the landmark Florida case of State v. Dixon, 283 So.2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory", then it meets the test of Furman v. Georgia, 408 U.S. 238.

COMMENTS OF JUDGE

My twenty-eight years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge - Felony Division - for almost ten years. During these twenty-eight years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty - then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE - THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy - but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life - for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando.

SENTENCE

Having adjudged ELWOOD CLARK BARCLAY guilty of Murder in the First Degree, I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentence which I have just imposed upon you and I hereby appoint Bartley E. Vickers to represent you on such appeal.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open Court at the Duval County Courthouse, Jacksonville, Florida, on this 18th day of April, 1980.

R. HUDSON OLLIFF, CIRCUIT JUDGE